

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

APR 12 2001

JAMES W. McCORMACK, CLERK
By _____ DEP. CLERK

ELLIS FOSTER, Individually, and on behalf of)
the ESTATE OF EDDIE BAGBY, JR.,)

Plaintiff,)

v.)

No. 4:99CV733 JWC

LARRY NORRIS, individually, and in his official)
capacity as Director of the Arkansas Department)
of Corrections as warden of the Wrightsville Unit,)
TOMMY ROCHELLE, individually, and in his)
official capacity as administrator at the boot camp,)
SGT. RICHARD WINTERS, individually, and in)
his capacity as drill instructor for the Wrightsville)
Unit, and SGT. JOHN BROADWAY, individually,)
and in his official capacity, Arkansas Department)
of Corrections,)

Defendants.)

**PLAINTIFF'S DESIGNATION OF GENUINE ISSUES
OF MATERIAL FACT**

Comes now the Plaintiff, and designates the following genuine issues of material fact in opposition to the Defendant's Motion for Partial Summary Judgment for John Broadway:

1. There is a genuine issue of material fact as to proximate cause or causation and what role pepper spray played in Eddie Bagby's death. Clearly, the extensive expert opinions set forth by Dr. Zimmerly, Dr. Wecht, and Dr. Stopford, who are some of the most qualified people in their specialties in the United States, and Dr. Erickson, the doctor who performed the autopsy for the medical examiner's office, all indicate the pepper spray was the cause of Eddie Bagby's death or was a significant player in Eddie Bagby's death. The Defendant has failed to come forth with one article, one piece of evidence, one affidavit, or one medical opinion that indicates in their motion that the cause of death was anything but pepper spray.

2. There are genuine issues of material fact as to whether the acts and omissions of John Broadway toward Eddie Bagby's death is in violation of Eddie Bagby's constitutional rights in violation of 42 U.S.C. §1983, the Arkansas Wrongful Death Act, the Arkansas Civil Rights Act, the Defendant baldly asserts that there is none and that the Complaint should be dismissed with no factual or legal basis whatsoever and no required showing of no genuine issues of material fact.

3. The designation of records and opinions of Dr. Wecht, Dr. Zimmerly, and Dr. Stopford clearly set forth reliable opinions under Federal Rules 702, 703, and Daubert/Kumho Tire analysis that would indicate that their opinions are reliable and can assist the trier of fact in this case. Plaintiff's only burden that a Daubert/Kumho hearing is to demonstrate by a preponderance of the evidence that the opinions are reliable. This burden has been more than met by the Plaintiff. At the least, there are genuine issues of material fact as to the role of pepper spray in causing Bagby's death.

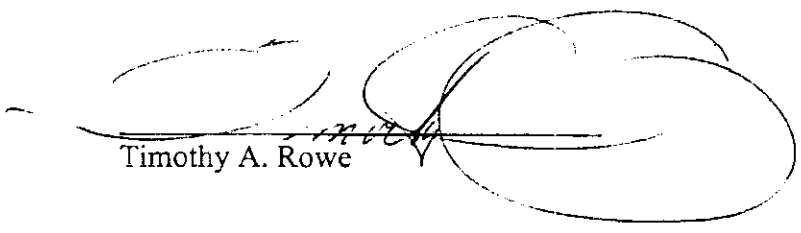
4. The Defendants have come forth with no medical evidence supporting to a reasonable degree of medical certainty that myocarditis, adrenalitis, sickle cell trait, or anything else caused Eddie Bagby's death other than pepper spray.

5. The Plaintiff relied upon their previous designation of material facts set forth in their Motion in Opposition to Defendants' Motion for Summary Judgment, the Record of Designated Materials, and complete medical opinions and attachments set forth in the depositions of Dr. Wecht, Dr. Stopford, Dr. Zimmerly, and the supplemental affidavits of Dr. Stopford and Dr. Zimmerly.

6. The issues of whether pepper spray caused Bagby to die a lingering and tortuous death in violation of his Eighth and Fourteenth Amendment rights are questions to be resolved by the trier of fact and cannot be resolved as a matter of law.

Respectfully submitted,

ROWE & HAMILTON


Timothy A. Rowe

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served by first class United States mail, postage prepaid, this 11th day of April, 2001, to the following:

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